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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*, *Petitioners*

v.

EAZOR EXPRESS, INC., *et al.*, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners

v.

Eazor Express, Inc., *et al.*, *Respondents*

Brief in Opposition to Petition For a Writ of Certiorari

The Petition for Certiorari is characterized throughout with omissions of facts which are highly significant and in many instances crucial to understanding the decisions in the courts below. Some inkling of the extent of those omissions may be gleaned by comparing Petitioners' statement of the Questions Presented with the counter-statement which follows:

QUESTIONS PRESENTED

1. (a) An international union and two of its locals executed a single bargaining agreement with various supplements all of which stated, "*** there shall be no strike without using all possible means of settlement." The International and one of the locals, in certain supplements, attempted to define and limit the circumstances under which they could be held liable for unauthorized strikes by members of that local, and in a manner which was not provided for in companion supplements pertaining to the other local; nevertheless, the International and the first local expressly agreed in the narrower supplement to "*** undertake every reasonable means to induce *** employees to return to their job during any period of any unauthorized stoppage of work." In such a case, did the courts below err in concluding that the collateral obligation with respect to unauthorized strikes, expressly acknowledged to exist in the more narrow supplement, was implicit in the broad primary obligation with respect to strikes set forth in all of the supplements?

(b) May unions be held liable for a strike which the chief executives of the unions allegedly did not authorize, where all of the hundreds of members of the locals involved who were employed by the employers involved participated in the strike, and where the strike was supported by strike votes supervised by the union executives, organized and led throughout by union stewards and committeemen, and where strikers obtained work with other unionized employers through a hiring hall maintained by one of the unions?

(c) In such case, is it error to find that prompt replacement of the stewards and discipline of the strikers by the unions would have terminated the strike promptly, where there is evidence that the previous labor relations record of the employer was excellent; that the strike occurred after two union members were terminated for

deliberately refusing direct work orders and that those members had a right to resolve disputes associated with their terminations by arbitration, and where there were almost no other grievances pending between the employer and union members?

2. (a) The damages awarded consisted of the operating losses which two carriers sustained during a four-week period, and both sides produced experts who testified to the amount of such losses on the basis of the same accounting records. The differences in the conclusions reached were solely the result of differences of opinion as to matters of proper accounting practice in specifically defined areas. The award of the trial court, while for a lump sum, was directly in accord with the detailed Requests for Findings and Brief dealing with all of the issues which were submitted by one of the parties. On appeal, both sides agreed that the court of appeals could review and reach its own conclusions, on the basis of its own review of the evidence and the Requests for Findings and Briefs submitted below by all parties. In such a case, where the court of appeals does, in fact, review the record and affirm the lower court on the basis of that review, should this Court grant a writ of certiorari to require the court of appeals to remand the case to the trial court for specific findings?

(b) Where a trial court, in an action for breach of a labor contract, limits the plaintiffs' award to the plaintiffs' direct operating losses during a four-week strike plus pre-judgment interest, and a court of appeals, after review, expresses the opinion that the award of pre-judgment interest was appropriate, should this Court grant certiorari for the purpose of requiring either the court of appeals or the trial court to explain in detail its reasons for awarding interest?

(c) In such a case, where a court of appeals, after independent review of the record, concludes that the trial

court was correct in computing the amount of plaintiffs' direct loss, but clearly erred in limiting its award to fifty percent of that loss plus pre-judgment interest, must the court of appeals, after holding that the plaintiffs are entitled to their direct losses in full, remand the matter to the trial court, for further consideration of the issue of pre-judgment interest, when the court of appeals determines independently that an award of interest is required "in order to arrive at fair compensation"?

STATEMENT OF THE CASE

Introduction

This is a case in which a very large motor freight carrier and its affiliate, whose operations were almost entirely disrupted for approximately one month as the result of a Strike, sought to recover damages from the International Brotherhood of Teamsters and two of the many locals with which the employers had executed a national collective bargaining agreement covering the period April 1, 1967, through March 31, 1971. Although the Strike was in direct violation of the parties' contract, it was led throughout by Union stewards and supported by all of the hundreds of members of the International and two Locals at the employers' principal terminals and by the great majority of members of other Teamster Locals who were parties to the same contract and manned other terminals of the employers throughout the system.

The case was tried by a newly-appointed trial judge who, while apparently convinced of the Unions' liability under the facts stipulated to prior to trial, sought nevertheless, throughout the course of the proceedings, to induce settlement, on a liability theory and in an amount which would not unduly trouble the Unions, even though the Unions, from the inception, refused to acknowledge liability or offer one cent.

Plaintiffs contended that, even though the Strike was in direct violation of the Unions' contract, it was in fact authorized and called by a vice-president of one Union Local who, in fact, had authority to call the Strike. However, the trial judge, while conceding that "*** the circumstances and the sequence of events are undeniably suspicious," nevertheless chose to accept the testimony of the Union official involved, to the effect that he had not called the Strike, and found that the Strike was not authorized.

Nevertheless, the judge did impose liability on the basis of the alternative grounds discussed in the Unions'

Petition here, one of which, failure to discipline, had the advantage, not unrecognized by the Unions, of further strengthening the arm of the International in future dealings with its Locals with respect to allegedly unauthorized strikes. Here, the Unions claim that the employers' contention, adopted by the courts below, that the Unions should have taken stronger measures to terminate the Strike, is simply hindsight. This is simply not so. The first of the two lawsuits consolidated in this proceeding was filed on the second day of the Strike, and it included a specific allegation that the Unions were not taking effective actions to terminate the Strike as required by the parties' contract. Also, contrary to another assertion in the Introduction to the Unions' Petition, both the district court and the court of appeals concluded that, if the Unions had taken appropriate action promptly, the Strike would have ended promptly. And there is ample support in the record for that conclusion.

Plaintiffs sought to recover the following damages: (a) 1.1 Million Dollars in direct operating losses which the employers sustained during the Strike; (b) 1.3 Million Dollars in profits lost on diminished general commodities tonnage during an eighteen-month period following the Strike, and (c) hundreds of thousands of dollars in interest which the primary carrier was obliged to pay on loans which the primary carrier was obliged to carry and/or greatly increase as a result of the Strike.

As part of his continued effort to dispose of the case on some basis which the Unions might find satisfactory, the trial judge was very harsh in his treatment of plaintiffs' damage claims even though, in every instance, the fact of damage and the large amounts involved were very well documented. The principal plaintiff had been operating at a profit for thirty-seven consecutive years and both plaintiffs were enjoying a good year up until the day of the Strike; both suffered huge losses during the Strike and lost hundreds of experienced employees as a result of the Strike. Also, the principal plaintiff became highly unprofitable after the Strike and continuously sustained a substantial loss in volume. Nevertheless, the trial judge awarded plaintiffs nothing for lost profits during or after the Strike and, in a decision reversed by the court of appeals as without precedent in law or basis in fact, limited his award to fifty percent of direct operating losses during the Strike less legal expense. This was based on findings that the employers failed to mitigate damages by rejecting an alleged Union offer to end the Strike at its midpoint if the employers would permit all but the Strike leaders to return to work without penalty.

Since this was an action for breach of contract, and the direct operating losses which were the basis of the award were subject to calculation, the judge properly included pre-judgment interest in his award.

It was the employers, rather than the Unions, who filed the first appeal from the decision of the trial judge. The court of appeals found some support in all of his findings and conclusions on the liability issues, but reversed his conclusions that the employers had failed to mitigate damages and had failed to establish the amount of the counsel fees which they incurred in their attempts to terminate the Strike. The propriety of neither of these conclusions is challenged by the present Petition.

The trial judge greatly complicated plaintiffs' ability to attack his limited damage award by declining to make very detailed findings on those issues. However, his ultimate finding as to the amount of plaintiffs' operating losses during the Strike was directly consistent with a series of detailed Requests for Findings and Briefs on this subject submitted by plaintiffs' counsel, all of which were annotated to the Record. These documents and the counterparts submitted by the defendants were included in the Record reviewed by the court of appeals, and that court specifically stated, after review, that it found support in the Record for the trial judge's finding as to the amount of plaintiffs' direct loss.

Even as modified by the court of appeals, the award

below, while substantial, compensated plaintiffs only for their direct Strike losses plus interest and was substantially less than forty percent of plaintiffs' actual claim.

Factual Background

A. Eazor, Its Operations, and Its Labor Relations Prior to April 1968

Eazor was founded in 1937 and has its principal place of business in Pittsburgh (J.A. 164). By the summer of 1968, directly and through Daniels, Eazor employed approximately 2500 persons (J.A. 1427) and operated 40 general commodities terminals and 31 special commodities terminals in 15 eastern, midwestern, and southeastern states (J.A. 172-174). Approximately 90 percent of Eazor's revenue and 50 percent of Daniels' revenue derived from general commodities freight (J.A. 3392, 1106a). The hubs of a general commodities motor freight operation are breakbulk commodities terminals. There were two of these in the Eazor-Daniels system, one in Pittsburgh and the other in Warren, Ohio (J.A. 1818-1820). Approximately 300 drivers, dock workers and garage personnel were employed at each of these terminals (J.A. 1820-1821, 1704, 1939-1940, 2296-2297).

B. The Defendant Locals and Plaintiffs' Relations With Them Prior to April 1968

Local No. 249 is the largest Teamster local in Western Pennsylvania and in 1968, its members included all of the drivers and dock workers, but none of the garage employees, at Eazor's Pittsburgh terminal (J.A. 165-166, 1809, 2283). Local No. 249 had a long history of participation in wildcat strikes (J.A. 1392-1393), and such strikes had been extremely damaging to the motor freight industry in the Pittsburgh area. In fact, by 1968, Eazor was the only

national motor freight carrier which still had a terminal in Pittsburgh (J.A. 2294-2295, 371a).

Notwithstanding the problems experienced by other carriers in the area, Eazor had never had a substantial strike other than an industrywide strike prior to April, 1968 (J.A. 2271). The President of Local No. 249 conceded that Thomas Eazor, chief executive of Eazor Express, had a "good operation", "was very close and always had been" and "always worked with his men" (J.A. 2883, 2895).

Local No. 377 maintains headquarters in Youngstown, Ohio (J.A. 166). At all times material, its members included the drivers, dock employees, and garage employees at the Eazor-Daniels terminals in Warren, Ashtabula, and Youngstown, Ohio (J.A. 166, 2506, 2575-2583).

Like Local No. 249, Local No. 377 had a long history of involvement in wildcat strikes (J.A. 3179-3182, 2313); it also had been threatened with the imposition of trusteeship by the defendant International for a variety of other reasons over the years (J.A. 2014-2016).

Daniels was in business for some years prior to its being acquired by Eazor in October, 1967, and its revenues were almost as large as Eazor's at that time (J.A. 3177-3179). While Daniels reported having made money as recently as 1966, it sustained large losses in 1967—because of an industry-wide strike which occurred in the spring of that year and because of an unauthorized steel-haulers' strike which occurred in the summer of 1967 and adversely affected the adjacent general commodities division in Warren (J.A. 3180-3182, 3172-3173, 3392). In fact, according to the uncontradicted testimony of Robert Eazor, Local No. 377's over-the-road steward and committeemen at Warren had repeatedly led the men there in unauthorized strikes (J.A. 2313).

C. The Agreement and the Parties To It

In addition to the statements on this subject in the Petition, the Court should know that a Pretrial Stipulation

of the parties (J.A. 166-167, 169-171) establishes that The National Union Committee of the defendant International, as well as the defendant Locals and many other locals, were parties to the National Master Freight Agreement, and that the National Union Committee of the International in all instances and the Locals in specified ones were parties to area agreements "which were supplemental to the National *** Agreement, covered the same time period," and "*** were the product of contemporaneous negotiations *** conducted on behalf of the unions involved by the National Union Committee and subcommittees appointed by, deriving their authority from, and acting on behalf of the National Union Committee."

Article 2, Section 4, of the Master Agreement provides, in part (J.A. 256):

> "The employees covered under this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. It is understood that the printing of this Master Agreement and the aforesaid Supplements in separate Agreements is for convenience only and is not intended to create separate bargaining units."

The National Agreement and all Supplements were voted on by the membership of all locals covered, acting as a single body, pursuant to the International's Constitution (J.A. 54a-55a).

The National Agreement and all applicable Area Supplements included the following provision (App. 42a):

> "The Unions and the Employers agree that there shall be no strike, lockout, stoppage, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement and in the National Agreement if applicable, of any controversy which might arise."

The only contractual remedy of an employer confronted by a strike which violated the foregoing provisions

was the right to discharge participating employees (306a), and the International conceded that, in practice, large scale discharges are impractical, since experienced employees who are terminated can readily obtain employment elsewhere in the industry (J.A. 2971-2972).

In addition, an employer has the right to seek an injunction and to sue for damages.

D. The April 1968 Strike and Its Aftermath

In April, 1968, the Local No. 377 men employed at the Daniels special commodities terminal in Youngstown walked out, claiming pay shortages; the Local No. 377 men at Warren left their work in sympathy, and strikers from both of these terminals established a picket line in front of the Eazor terminal in Pittsburgh which the Local No. 249 members employed there (including the stewards and committeemen) refused to cross (J.A. 176, 180-181, 1078-1079, 1434, 1706-1708, 2510-2511, 3148-3152).

The April, 1968, work stoppage, was a direct violation of the Unions' no-strike pledge. It affected the two break-bulk terminals in the Eazor-Daniels system and resulted in Eazor-Daniels sustaining a net loss of $148,000 that month—and this was the only loss month sustained by the system in 1968 prior to July (64a; J.A. 3198-3200, 3683-3684).

Nevertheless, Eazor imposed no sanction on any participant, on the basis of representations by union officials that, if Eazor refrained from doing so, the International would guarantee that there would be no more unauthorized work stoppages (J.A. 1436-3153).

The procedure established in the parties' Agreement and its Supplements required that all grievances be reduced to writing and processed through the grievance machinery unless they were resolved by discussion between the supervisor of the employee involved and the union steward (J.A. 1437-1439, 1487-1518, 2626). It is undisputed that at the time the strike in suit began there

were no written grievances pending with respect to any Daniels employee at the Warren terminal, and there were only two written grievances pending in Pittsburgh, both of which were being processed in the normal manner and were ultimately resolved in the employer's favor (J.A. 986-987, 181, 1663-1666).

E. The Strike of August 20—September 25, 1968

As the trial court below found (App. 6a), John J. O'Neill, Vice-President and Business Agent for Local 377, was the representative designated by the Ohio Area Supplements as "the Union's authorized representative to * * * (2) make commitments for the '*Union*' generally, and in particular having the sole authority to act for the Union in calling or instituting strikes or any stoppages of work." "Union" in the National Agreement and all Supplements refers to both the Local Unions *and* the National Union Committee (274a), and the trial court and the court of appeals found that this Committee was actually the International (App. 17a-18a, 46a-48a).

It is *not* disputed that the Strike began under the following circumstances: two Local No. 377 members who worked out of the Daniels' terminal in Warren, Ohio, were terminated for refusing to obey direct work orders (J.A. 1000-1005, 1017-1019, 1079-1081), and O'Neill, who sympathized with the men (J.A. 1022-1024, 2524), was involved in an altercation with an Eazor supervisor which took place in the course of a grievance meeting which followed the terminations (J.A. 1019-1022, 1082-1083, 2523-2524). At that time, according to plaintiffs' witness Clark, O'Neill specifically threatened to call a strike (J.A. 1024).

While O'Neill denied specifically threatening a strike, he did admit telling Clark, at the end of this meeting, that Clark was "making a grave mistake" (J.A. 2526). Then, admittedly, O'Neill spent an hour walking around the Terminal, speaking to the men (J.A. 1025-1026, 1085, 2528-2529), and O'Neill left the Terminal after making an uncomplimentary comment about the Company to its terminal manager (J.A. 1085).

Next, O'Neill crossed the street to enter a truck stop where, admittedly, he conversed with various Eazor-Daniels over-the-road drivers and one of their committeemen (J.A. 2530-2532, 2703-2704). Uncontradicted evidence showed that within ten minutes after O'Neill left the Terminal, an out-of-town driver told the dispatcher that the Terminal was "going to go on strike"; the same man returned a short while later to inform the dispatcher that the strike would begin in one half hour; the Strike did begin at Warren at the time predicted; also, it was extended to Youngstown by the Local No. 377 road steward from Warren one half hour later (J.A. 1028, 1029, 1086-1087, 1635-1638, 2299-2300).

The trial court found (App. 7a-8a): "Although the circumstances and the sequence of events are undeniably suspicious, I find, in the absence of evidence to contradict [O'Neill's self-serving statements as corroborated by the testimony of two other Local No. 377 officials] * * * that he did not call the strike, and that, in fact, he cautioned against it."[1]

What the trial court did not state was that plaintiffs' testimony with regard to the strike threat by O'Neill, the report by the employee, and O'Neill's activities was all given on the basis of memoranda made by the witnesses shortly after the events in question, and that two of those

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1. The relationship between O'Neill's actions and the commencement of the Strike is strikingly similar to that which has led other courts to find that other alleged wildcat strikes were in fact authorized by union officials. See *Mason-Rust v. Laborers' International Union, Local 42*, 435 F.2d 939 (8th Cir. 1970); *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 1551 (6th Cir. 1970); *N.L.R.B. v. Truck Drivers & Helpers, Local U. 676, etc.*, 450 F.2d 413, 415 (3d Cir. 1971); *Wagner Electric Co. v. Local 1104*, 361 F. Supp. 647 (E.D. Mo. 1973), *aff'd*, 496 F.2d 954 (8th Cir. 1974); *Celotex Corp. v. United Steelworkers of America*, 388 F. Supp. 1132 (E.D. Pa. 1974).

witnesses were not employed by Eazor at the time they testified (J.A. 1015, 1019, 1632-1635).

Furthermore, while O'Neill denied at the trial that he had done anything to incite the men while walking around the Terminal and after leaving it, little weight should have been accorded such testimony in view of the fact that, when he gave his discovery deposition in May of 1971, O'Neill purported to have no recollection whatever of what he did after the grievance meetings and after leaving the Terminal (J.A. 2647-2649) and insisted that this was so even when he has read some of the Eazor memoranda on the point—to see whether they would refresh his recollection (*id.*).

Eliser, a local 377 official who gave brief corroborating testimony in support of Mr. O'Neill at the trial (J.A. 2795-2800), was not mentioned as a defense witness in the defendants' Pre-Trial Memoranda, in the Pre-Trial Stipulation or, indeed, at any time until, weeks after the plaintiffs' evidence was concluded, Local No. 377 filed a supplemental list of witnesses (J.A. 2793-2794).

Also relevant in this regard was plaintiffs' evidence that O'Neill and the other officials of Local 377 refused to come to the scene or accept or return any of scores of telephone calls which Eazor made to the Local 377 Union Hall and to O'Neill's home, in an effort to obtain assistance, between 3:30 P.M. on Tuesday, August 20th, and Mr. O'Neill's appearance in court on the morning of Friday, August 23, 1968. Testimony to this effect, corroborated by contemporaneous memoranda, was given by five witnesses (J.A. 1029-1031, 1088-1089; 1450, 2432, 2319-2322). Also, the more important of these witnesses were no longer employed by Eazor at the time they testified (J.A. 1014, 1402).

From Warren, the Strike spread to Pittsburgh, after which Union members from the two terminals set up picket lines throughout the Eazor-Daniels system, and these lines were respected by the members of the Teamster locals employed in many other areas, although they were unlawful

(J.A. 182, 1149-1152, 345-356). As a result, all Eazor-Daniels general commodities freight was embargoed on August 26th, and this embargo continued until September 18th in all areas but Pittsburgh, and until September 25th there (J.A. 188, 201-202, 3224, 1982).

From its inception, the Strike was led, openly and notoriously, by the over-the-road shop stewards and committeemen of the defendant Locals (Proposed Annotated Liability Findings Nos. 236(b) and 271(b). Local No. 249 found employment for many strikers through its hiring hall, and others found employment with Eazor's competitors by calls placed to the strike leaders by Local No. 249 stewards employed by the competitors (J.A. 194; Proposed Annotated Liability Findings Nos. 267-270, J.A. 332-333).

The Petition, echoing the Opinion of the district court (App. 16a), states that the Union members reacted angrily to whatever efforts Union officials did make to persuade them to return to work. This is misleading. The President of Local No. 249 testified that, at the inception of the Strike, his men seemed angrier with the Union than with their employer and most of them wanted to return to work (J.A. 2884-2892). Various rank and file members of Local 377 testified to their desire to work throughout the Strike (J.A. 1077-1078, 1820-1822, 1308, 1315, 1332). However, as the Strike continued, it was characterized by the accelerating pattern of violence and threats of violence described in the Teamsters' Petition.

F. Eazor's Efforts to Obtain Judicial Relief

On August 21, 1968, Eazor and Daniels instituted one of the two cases which are now before this Court, in the Court of Common Pleas of Trumbull County, Ohio. In that suit, the plaintiffs petitioned[2] for an injunction as well

2. The Petition specifically averred (J.A. 21): "Plaintiffs say that by the terms of the collective bargaining agreement, defendant Teamsters and Teamster Local are required to induce employees to return to work at any time there is a work stoppage in violation of the agreement and that defendant Teamsters and Teamsters Local have wholly failed to do so or attempt to do so."

as damages (J.A. 18 *et seq.*). However, all of the defendants, including the International and Local No. 377 as well as various individuals, substantially prevented the suit from having any immediate or substantial effect on the work stoppage by entering an appearance by a single attorney—the regular lawyer for Local No. 377—and jointly removing to the United States District Court in Cleveland (J.A. 28 *et seq.*).

The Federal Court did not enter a restraining order, even as to violence, until September 4th (J.A. 4730-4731) and declined to hear evidence on plaintiff's application for a preliminary injunction until September 12th (J.A. 3088-3089). As a consequence, the defendants were able to prevent the Ohio Court from entering either a restraining order or an injunction against obstructive picketing as well as violence. In Pittsburgh, Eazor filed separate suits. In the first, filed in State Court, Eazor sought only injunctive relief (876a), and appropriate orders were entered promptly and enforced by the Allegheny County Court throughout the Strike. The second Pittsburgh suit, which is now before this Court, was instituted in the District Court for the Western District of Pennsylvania on August 24, 1968 (J.A. 52, *et seq.*); there, Eazor sought only damages.

G. Termination of Strike

On September 17, 1968, after first according all Local No. 377 strikers, other than the initial two grievants and the over-the-road steward and his two committeemen, two opportunities of returning to work without penalty, Eazor permanently closed the Daniels terminal at Warren and discharged all strikers employed there (J.A. 199-201). This action was taken after the Warren strikers rejected the recommendations of their own lawyer (J.A. 2602), and ultimately, their own union officials, that they return to work on this basis and insisted that none of them would return unless all, with the possible exception of the original

dischargees, were accepted back (J.A. 2207-2211, 2221-2225, 2602-2604).

Up to this point, Eazor had discharged no Local No. 249 members other than the road steward, one of his committeemen, and a third strike leader, and even that action had not been taken until September 9th, twenty days after the Strike began (J.A. 193). On September 17th, at a meeting at the International headquarters in Washington, Eazor offered to permit even these leaders to return to work, pending arbitration of grievances which might be filed as the result of their discharge, but the offer was rejected by the Unions (J.A. 2390-2392). At the end of the meeting, the International official chairing the meeting told Thomas Eazor: "Everybody goes back to work or nobody" (J.A. 2392, 2422).

On September 18, 1968, hundreds of strikers made a mass attack on a convoy of Eazor trucks in Pittsburgh (J.A. 199-200, 1973-1974, 2603-2604, 2296-2298, 2394-2395). Eleven Local No. 249 members[3] were arrested, and, following trial, they were convicted and imprisoned for criminal contempt of court by the Court of Common Pleas of Allegheny County (J.A. 200, 1115-1117).

On September 24, 1968, after the Supreme Court of Pennsylvania refused to stay execution of these sentences, Local No. 249 officials permitted its striking members to vote, for the first time by secret ballot, on whether to return (J.A. 202, 1767-1773, 1792). They voted to do so, and the President of the Union and the strike leaders led all of the men back to work on September 25th (J.A. 1222-1224, 1587-1591, 1795, 2895).

The Petition on page 11 quotes squibs from a letter in which Eazor told the strikers that they had "defied the International Union * * * (and) * * * defied the Local Union" (2 J.A. (Exs.) 362a). This letter was written very early in

3. Contrary to a statement in the Petition (page 10), those jailed did not include any of the stewards or committeemen who led the Strike.

the Strike, and its author explained that, at the time, he was relying on telegrams from Union officials repudiating the Strike, but that, as time passed and none of the strikers returned, he came to conclude that the Strike was actually being supported by the Unions (J.A. 2289-2290). The Petition also quotes from a note which an Eazor labor relations representative sent to the General President of the International on September 6th, thanking him "for your help in this endeavor" (4 J.A. (Exs.) 1158a). The "endeavor" referred to in this connection was to have the Unions take action against a Local 249 steward who was interviewed on television about the Strike, spoke in favor of it, and stated, among other things, that the strikers were receiving help from their Union (J.A. 422a). As a matter of fact, this steward was never removed during the Strike by either the International or the Local. The President of Local 249 testified as a witness on his behalf in the post-Strike arbitration proceedings (J.A. 205), and Normal Kegel, a general organizer for the International who was a member of the Grievance Committee which deadlocked on this issue previous to the arbitration, voted against this steward's discharge (4 J.A. Exs. 864a).

H. Pretrial Proceedings

Some of the Reasons assigned in the Petition for the granting of a writ of certiorari pertain to the decision of the court of appeals to modify and affirm the decision of the district court rather than to remand for further findings. To understand this fully, this Court must be familiarized with the extraordinary manner in which this case was handled in the trial court.

This case was assigned to Judge Hubert T. Teitelbaum in January, 1971, very shortly after Judge Teitelbaum's appointment to the bench (J.A. 6, 11).

After taking scores of depositions, plaintiffs' counsel met repeatedly and at length with counsel for the various defendants and eventually secured a 44-page Stipulation

of Undisputed Facts (J.A. 161-225). This documented, among other things, the International's involvement with the National Master Freight Agreement and the uniform failure on the part of all of the defendants to take or threaten to take any action to discipline any of the unauthorized strikers or their leaders (J.A. 166-168, 170-171, 203).

At the final pretrial conference, held April 14, 1972, Judge Teitelbaum announced, for the first time, that he had decided to bifurcate the trial as to liability and damages for the purpose, he said, of encouraging settlement after he had decided the liability issues. He persisted in this ruling even though he was advised by plaintiffs' counsel that there was no possibility of settling the case, and that almost all of the witnesses who would testify as to damages would also testify as to liability (J.A. 958-965).

I. The Trial as to Liability

Throughout the trial, Judge Teitelbaum consistently and repeatedly adopted arbitrary postures consistent with his achievement of the following objectives:

> (a) Limiting the admission of evidence which would justify imposing liability on any of the defendants on a basis which would directly implicate the unions or their top officials in actually authorizing the strike;
>
> (b) Creating or finding some basis which might justify limiting the damages to be awarded if liability were imposed, and
>
> (c) Inducing the parties to settle for a sum which would compensate the plaintiffs only for the direct damages, and perhaps only partially, which they sustained during the strike itself.

The actions of the trial judge, which are the basis of our assertions concerning his fixed points of view, include incidents recorded at the following points during the

presentation of plaintiffs' evidence as to liability: during Gilmer testimony (J.A. 1193-1197, 1200-1205, 1210-1211, 1220-1221); during Malivuk testimony (J.A. 1537-1586); during testimony of Local No. 377 "rank and filers" (J.A. 1286-1290, 1308-1309, 1317-1318, 1325-1326); during Airesman testimony (J.A. 2052-2056); Cf. rulings during O'Neill testimony (J.A. 2521-2522); during McGeough testimony (J.A. 2178-1280).

After plaintiffs rested as to liability, Judge Teitelbaum recessed the trial and gave the defendants, who had conducted no discovery by depositions, five weeks to respond.

When trial resumed on June 27th, the first defense witness was John J. O'Neill. O'Neill had given a deposition prior to trial in which he purported to have no recollection of anything that occurred immediately after a grievance meeting of August 20, 1968, which immediately preceded the Strike (J.A. 2647-2649). In the same deposition, O'Neill freely and expressly conceded that he was the only Local No. 377 officer involved in handling the Strike (J.A. 267, 2678-2679), and that the International had taken no steps whatever to terminate the Strike other than sending a telegram at the Strike's inception (J.A. 2014-2016). This same fact was specifically conceded in the Pretrial Stipulation with respect to undisputed facts (J.A. 194-196).

However, when O'Neill was called as a defense witness at trial, he purported to have a complete recollection of the events which took place immediately after the grievance meeting of August 20, 1968, and during the following days; of his having allegedly warned his members immediately prior to the Strike against striking, and of his allegedly having instructed his stewards against participation in the Strike when they allegedly consulted him on the day the Strike began (J.A. 2528-2536). O'Neill also purported to have a detailed recollection of a series of meetings and conversations during the Strike between himself and William Presser, an International vice president from Cleveland, in which Presser allegedly attempted to persuade the Local No. 377 members to return to work (J.A. 2540-2541, 2551-2558).

Presser had never been identified as a defense witness prior to trial and was never called as a witness.

In the course of O'Neill's direct examination, Judge Teitelbaum asked him a leading question, the obvious purpose of which was to have O'Neill state, as he did, that there was allegedly a time, in early September, 1968, in which the Local No. 377 strikers allegedly would have returned to work had Eazor chosen to limit its sanctions to the original two grievants and the strike leaders, but that Eazor, allegedly, rejected an offer to settle on this basis (J.A. 2560-2561, 2568-2569).

Plaintiffs' counsel commenced a lengthy cross-examination of O'Neill, to establish his general and specific lack of credibility. In the course of the questioning, Judge Teitelbaum accused plaintiffs' counsel of "pursuing the tactics of Don Quixote" (J.A. 2631-2632) and repeatedly suggested that O'Neill, when confronted with contradictions between his testimony at trial and his deposition statements, answer questions by stating "I don't know" or "I don't recall" (J.A. 2644-2645, 2647-2662).

Plaintiffs' counsel concluded his cross-examination on June 27, 1972, by establishing that O'Neill's testimony with respect to the settlement offer allegedly made to and rejected by Eazor in a courtroom in Cleveland, which the Judge had developed in his own questioning of O'Neill, was directly contrary to the following statement by O'Neill in a discovery deposition (J.A. 2668-2669):

> "There was no discussion with me about any settlement. There were meetings with the Judge and the opposing lawyers. I was not party of any discussions of any settlement."

At this point, the court recessed for the day and Judge Teitelbaum summoned all counsel to chambers; he stated that, on the basis of O'Neill's testimony, he felt he could award no damages after the point at which Eazor had allegedly arbitrarily refused to settle. The Judge's expressions seemed unshaken by statements of plaintiffs' counsel to the

effect that O'Neill's testimony on this subject was contrary to his deposition and would be contradicted.

Judge Teitelbaum was taken ill during the night; as a consequence, trial did not resume until August 28th. When the cross-examination of O'Neill resumed, the Judge permitted him to give unresponsive answers to questions which, if answered responsively, would have established that the Local No. 377 strikers had rejected an alleged union proposal for settlement on the basis allegedly submitted to and rejected by Eazor when that proposal allegedly was made to them by International Vice-President Presser earlier the same week (J.A. 2683-2686).

Other cross-examination established that testimony which O'Neill had given on direct examination on June 27th had been based on statements made to him by others, rather than his own knowledge. Plaintiffs' counsel moved to strike the original testimony as hearsay, and Judge Teitelbaum angrily denied the motion on the ground that the motion was "way out of time." When plaintiffs' counsel pressed the point, he was accused of being "fresh with the court." The Judge added that he had allowed plaintiffs' counsel "to put in evidence liberally," and, when plaintiffs' counsel denied that this was so, the Judge held him in contempt and fined him $50 forthwith (J.A. 2691-2692).

Judge Teitelbaum overruled an objection by plaintiffs' counsel and permitted counsel for Local No. 377 to lead another of his witnesses so that his testimony would accord with that of Mr. O'Neill with respect to the efforts which O'Neill testified he had made to persuade this witness not to strike on the day the Strike occurred, after the first answer of this witness was directly inconsistent with O'Neill's testimony; in overruling the objection, the Judge described the leading as "harmless" (J.A. 2703).

The Judge permitted counsel for Local No. 377 to call Local No. 377 officials Eliser and Seidita to testify with respect to the efforts which O'Neill allegedly made to prevent or terminate the Strike, even though O'Neill, in his discovery deposition, had not claimed that either of these

men was involved in efforts to control the Strike (J.A. 2678-2679), and even though neither man was identified as a witness in Local No. 377's Pretrial Memorandum or its Supplement filed in June of 1973 (J.A. 2793-2795, 2801-2806).

In rebuttal, plaintiffs called Robert Eazor and John W. Pelino, Esquire, who represented the plaintiffs at the negotiations in Cleveland at which O'Neill claimed there had been the offer to settle which Judge Teitelbaum felt to be reasonable. Both denied that any such offer was ever made (J.A. 2312-2313, 2316-2317, 3085-3086).

J. The Trial Court's Decision as to Liability

The trial court rendered its decision as to liability on March 30, 1973 (App. 2a-20a). The court did find that the International as well as the Locals was a party to the contract, but had little choice but to so conclude on the basis of the Agreement itself and the facts admitted in the Pretrial Stipulation.

With respect to plaintiffs' prime contention, namely, that the Unions were liable for the Strike from its inception because the same was called by O'Neill, the court found for the defendants, although conceding that "* * * the circumstances and sequence of events (surrounding the inception of the Strike) are undeniably suspicious" (App. 6a-8a).

The court imposed liability on all defendants for failure "to exercise every reasonable means to end the strike." But he greatly weakened that conclusion by summarizing and accepting at face value the testimony belatedly given by union officials, such as O'Neill, as to their alleged efforts to terminate the Strike (App. 12a-15a).

K. The Trial as to Damages

The Petition notes at several points that the trial as to damages was lengthy, but gives no inkling as to the

nature of the testimony offered or the reasons why eleven trial days were required.

By a series of orders entered prior to the final pre-trial conference and at that conference, the court had made very clear that the trial was to proceed without further discovery. The damage schedules on which plaintiffs were to base their direct testimony on damages at trial were identified in the Pretrial Stipulation (J.A. 214), and copies had been furnished to defense counsel before the final pretrial conference (J.A. 3590-3591). Nevertheless, the defendants, for reasons of their own, had elected to pursue no discovery with respect to damages.

However, after the first phase of this case had been decided and trial on the issues of damages scheduled to begin on May 7, 1973, the court scheduled another pretrial conference at the request of Sidney Dickstein, Esquire, of Colson and Shapiro, whose appearance for the International had been entered when the Court was considering the liability issues. At this conference, plaintiffs were required to provide Teamster accountants with immediate access to all Eazor documents which supported their claim. Plaintiffs' counsel agreed to this on the basis of representations that 3½ days would be required for the inspection and with the expectation that at the conclusion of the inspection, the defendants' attorneys would indicate to plaintiffs' counsel any areas in which their experts found themselves in disagreement with the plaintiffs' schedules, so that, hopefully, any adjustments indicated could be agreed to and the time for trial shortened (J.A. 3602-3603, 3800-3801, 4035).

Pursuant to this understanding, plaintiffs did make their books and their director of accounting, Michael Bache, available, and the defendants sent six accountants to plaintiffs' place of business; those men spent 3½ days inspecting documents in the first week of May, 1973, and at Noon on May 5th, their chief advised plaintiffs' counsel that their work was concluded (J.A. 4154). However, on May 7th, when plaintiffs' counsel asked defense counsel informally concerning the results of the inspection and the possibility of reaching agreement, they refused to furnish any information whatever as to the findings of their accountants.

Plaintiffs' first witness with respect to damages was Robert Eazor, plaintiffs' president. Very early in Mr. Eazor's direct examination, when he was testifying on an entirely different matter, Judge Teitelbaum asked counsel for Local No. 377 to refresh his recollection as to testimony "* * * that on a certain date there was a meeting when the men said they would go back to work if everybody was put back to work and then they would arbitrate the certain people who were in contention" (J.A. 3440-3441).

In their Pretrial Memorandum, plaintiffs identified their damage schedules and their own executives, Thomas and Robert Eazor and Michael Bache, as witnesses (J.A. 132, 123), and the trial court conceded that Robert Eazor is expert in operating a trucking company (J.A. 3252). Nevertheless, Judge Teitelbaum displayed grave initial reluctance to permit Mr. Eazor to express *any* opinions, even on such general matters as to whether, had it not been for the Strike, Eazor would have earned a profit during the Strike months directly involved (J.A. 74-76, 89-90, 99-100). The Judge reconsidered, but, shortly thereafter, summoned counsel to sidebar and indicated that he intended to attach little weight to Mr. Eazor's opinions unless they were otherwise supported; plaintiffs' counsel pointed out, in response, that the opinions of Mr. Eazor would be entitled to substantial weight if, as ultimately proved to be the case, none of them was contradicted by any expert or factual testimony offered by the defendants.

An important feature of plaintiffs' damage claim was evidence that, from the time the Strike ended until the conclusion of the damage claim period on March 31, 1970, plaintiffs sustained *a continuous loss of volume* in general commodities traffic averaging approximately 10,000 tons per month (J.A. 3240-3241; 638a-639a). Robert Eazor testified that this problem was at least partially attributable to

plaintiffs' loss of hundreds of experienced drivers during the Strike, its inability to replace them at all for many months, and with satisfactory drivers for a much longer period (J.A. 3239-3243, 3287, 3359-3360). The testimony as to the shortage of drivers was fully corroborated by reports which Eazor and Daniels filed at the time with the ICC (1161a). Nevertheless, Judge Teitelbaum commented, as soon as he heard the testimony, that the claim was "highly speculative" (J.A. 3267).

Plaintiffs' second witness as to damages was the sales manager for Daniels and the person most familiar with the sales patterns associated with the Warren terminal (J.A. 3500-3504). This witness testified to a complete loss of business from specific Warren customers and to a permanent impairment in the volumes of freight shipped by five others after the Strike. He also testified to the contemporaneous statements of those shippers as to their reasons for providing Daniels with no, or only limited amounts of freight when their business was solicited after the Strike, i.e., the customers had turned to alternative sources and were satisfied with them (J.A. 3504-3568). Although this testimony was clearly admissible as indicating the then current state of mind of the customers, and plaintiffs cited the cases which so held, Judge Teitelbaum said at the time that he would not consider the testimony, and ultimately he did not do so (J.A. 3522-3525, 3239-3240).

Plaintiffs' third damage witness was Michael Bache. Bache did not testify until May 10, 1973, at which point the defendants' accountants had been meeting with him and examining the plaintiffs' damages schedules and supporting records for one week (J.A. 3588-3589). There is a Rule in the trial court which requires parties to furnish each other with copies of "all reports * * * of any expert whom a party expects to call as a witness at trial" (J.A. 3591). The Pretrial Stipulation filed with the Court on April 13, 1972, referred to a series of schedules prepared by Mr. Bache which set forth in detail the calculations on which plaintiffs' damage claims were based (J.A. 214). It was these

very schedules which the Teamsters' accountants began auditing the week before trial began (J.A. 3594).

Immediately before Bache testified, plaintiffs' counsel asked defendants' counsel for copies of the reports of their experts (J.A. 3568-3589). Mr. Dickstein claimed that his accountant had not yet completed his report "and it would to a very large extent * * * depend" on what Mr. Bache would testify (J.A. 3589). Counsel for Local No. 377 stated that he was not required to comply with counsel's demand, because plaintiffs themselves had not complied with the local Rule (J.A. 3589-3590). Plaintiffs' counsel argued that production of Mr. Bache's schedules constituted compliance, but Judge Teitelbaum ruled, without even looking at the schedules, that they did not (J.A. 3590-3595). He then required plaintiffs' counsel to call Mr. Bache as a witness without being furnished in advance with the copies of any reports from Teamster accountants on the ground that, unless plaintiffs' counsel was willing to proceed on this basis, the court would not permit Mr. Bache to testify at all (J.A. 3592-3597).

As was to have been anticipated under the circumstances, Bache's cross-examination proved to be a long and tortuous one (J.A. 3781-3963), devoted principaliy to questions establishing that the monthly operating statements on which Bache's testimony as to operating losses was based included estimates and so-called "flopover" items, i.e., items related to prior periods, which plaintiffs' counsel had anticipated would be adjusted after they were audited by Teamster accountants, and had they furnished reports (J.A. 3801). Accordingly, plaintiffs closed their case with the express understanding that Bache would be called in rebuttal if, as anticipated, the Teamsters accountants testified to proposed adjustments of Bache's figures (J.A. 4035-4038).

The International called as its first witness John Dwyer, the most senior of the four accountants retained by the International, who, by this time, had spent approximately 35 man-days examining Eazor records (J.A. 4154-4170). Dwyer testified to adjustments to Bache's schedules

which, if accepted, would have indicated that Eazor sustained a loss of only $475,000 during the months of August and September, 1968 (1167a). Nevertheless, Dwyer expressly limited his testimony to adjustments which he had made in Bache's figures and refused to express an opinion as to whether, in fact, Eazor would have sustained a loss in either August or September, 1968, had it not been for the Strike, or the amount of such loss (J.A. 4079, 4081, 4083). Likewise, he was neither asked, nor did he testify to, his opinion as to the validity of plaintiffs' contentions concerning the long-term consequences of the Strike.

At the end of the first day of Mr. Dwyer's cross-examination, the Judge had a brief discussion with plaintiffs' counsel and Mr. Dickstein, which has not been transcribed. In essence, after noting the vast discrepancy between the Bache and Dwyer figures, the Judge asked whether counsel could not agree on some intermediate figures. In that connection, the Judge commented that it "should come as no surprise to Mr. Monteverde" that he had no intention of awarding any post-strike damages.

After Dwyer's first day, there was a four week recess during which Eazor's Accounting Department prepared revised schedules (855a, 856a) of operating losses, calculated in the manner advocated by Teamster expert Dwyer (J.A. 4468-4471, 4575-4579). Copies of these schedules were furnished to defense counsel when trial resumed, and they were also supported by detailed work sheets of adjustments (J.A. 4575-4579). Defense counsel were also tendered copies of these and an opportunity of auditing the revised schedules (J.A. 4499-4500, 4616-4620), and their accountants were present when some of this work was being done and suggested certain adjustments (J.A. 4577).

When trial resumed, the defendants called Mr. Bache as their witness, and he testified, on the basis of painstaking efforts made since he testified in May, to each specific adjustment which could be made in the figures for August and September, 1968, by following the methods adopted by Teamster accountants (J.A. 4468-4498); these

adjustments would have reduced the losses in those two months to around $700,000. However, on cross-examination of Bache, plaintiffs' counsel developed that, calculated by the same alternative method, the loss over the five-month period of August through December, 1968, would very closely approximate that which would be shown as having been sustained solely in the months of August and September, 1968, by following Bache's original accounting method. Bache also demonstrated that the nature and extent of the 1.1 million dollar loss disclosed by both methods could also be confirmed by working back from Eazor's year-end audited figures, and by calculating the loss solely on the basis of the gross profit lost on the revenue which the evidence showed was lost through the period (J.A. 4603-4640; 855a-856a).

L. The Trial Court's Decision as to Damages

Contrary to assertions made in the Teamsters' Petition, Bache's revised schedules did not constitute a substitution by plaintiffs for their original schedules, which were based on plaintiffs' operating statements. The purpose of the revised schedules submitted in rebuttal was to show that, no matter which of four methods one followed in calculating the direct Strike losses, the final figures were approximately the same.

Judge Teitelbaum filed his opinion as to damages (App. 21a-27a) on June 10, 1974. He found that Eazor-Daniels actually sustained losses of One Million Seventy-nine Thousand Three Hundred Thirty-two Dollars ($1,079,-332) during the Strike months of August and September, 1968 (J.A. 676), and this figure conformed exactly to calculations made on the basis of Eazor's actual operating statements for those months, adjusted so as to substitute actual expenses for certain expenses which were only estimated when the original statements were prepared (855a).

He concluded that plaintiffs would have earned no profit during the Strike months even without the Strike (J.A.

26a-27a), and he refused to assess the defendants with liability for any of the damages which plaintiffs sustained during the Strike but subsequent to September 9, 1968, on the ground that, on that date, allegedly, Eazor rejected the alleged Union offer to have all striking employees return to work pending the arbitration of the original two discharges and the subsequent discharges of the strike leaders (App. 33a-36a).

Judge Teitelbaum also rejected in its entirety plaintiffs' claim for damages continuing after the Strike, including $264,000 in interest expense, on the alternative grounds that such damages were not foreseeable and in any event were attributable to some other cause (App. 26a-30a).

Finally, the trial court deducted from the August and September losses $52,108 which plaintiffs' paid for counsel fees (App. 36a). This decision was based on the Judge's conclusion "... plaintiff has failed to sustain its burden of proving what portion, if any, of the legal expenses it incurred were directly related to the strike". This, too, was directly contrary to the Record and a position which not even the defendants had taken in their Briefs.

Again, although specifically requested to do so, the Judge refused to support his decision with any detailed findings, and many of his most important conclusions involved an arbitrary refusal to consider very material facts established by evidence which was both uncontradicted and unimpeached.

M. The Decision of the Court of Appeals

The long and carefully crafted Opinion of the court of appeals was written by Senior Judge Albert B. Maris. There were no dissents, and a petition for rehearing was denied. In summarizing that decision in the Statement of the Case and, indeed, throughout their Petition, petitioners create the impression that the courts below held that a duty to use every reasonable means to terminate a strike not authorized by a union at its inception is to be implied from

every "no strike" clause. But what the court below actually held was that the particular no strike clause involved in this case, because of its wording, included such a collateral obligation (App. 52a-56a).

Petitioners, in their Statement of the Case, also fail to characterize either accurately or completely the alternative grounds assigned by the court of appeals for imposing liability. The "mass action theory" was applied here because the evidence, summarized previously herein, showed that, from the inception of the walkout and for long periods thereafter, every single one of the approximately six hundred members of the defendant local unions who were employed by the plaintiffs participated in the Strike (App. 51a; J.A. 2296-2297), and that the picket lines established by those strikers were observed by members of other Teamster locals throughout the Eazor-Daniels system (J.A. 345-346), even though, under the National Master Freight Agreement, all of the Eazor-Daniels Teamsters were members of a single bargaining unit and parties to a contract which prohibited strikes pending exhaustion of remedies available under the grievance procedure (J.A. 256; J.A. 1418). The court of appeals noted that the premise of the "mass action theory" is that "large groups of men do not act collectively without leadership", and that it is for that reason that "a functioning union must be held responsible for the mass action of its members" (App. 57a).

Also relevant to the court's imposition of liability under the "mass action theory" was its related findings that "* * * here, * * * job stewards and committeemen, union functionaries * * * instigated, participated in, or actively encouraged members to continue their unauthorized work stoppage * * *" (App. 57a); that union liability under these circumstances can be based on common law agency principles (App. 57a); and that "* * * a principal may ratify, by subsequent conduct inconsistent with repudiation, an agent's unauthorized acts earlier disaffirmed by the principal * * *" (App. 58a). In this connection, the court pointed out (App. 58a) that other courts

which have imposed liability upon the theory of mass action or agency or both "* * * stressed the failure of the unions involved to take steps, other than written and oral exhortation, speedily to terminate illegal strikes as an indication of passive acquiescence in the strike" (App. 58a).

The court of appeals considered, and rejected, Union arguments based on the so-called "steward's clause" in the National Master Freight Agreement on the ground that its purpose was to limit union liability "for any unauthorized acts" of job stewards and their alternates (App. 52a-53a). Considered, too, was language in the Central States Supplements (App. 53a-54a) purporting to absolve the Union from liability "for damages resulting from * * * unauthorized acts of its members" during unauthorized strikes. The court noted (App. 53a-54a) that, in the very next sentence of the same supplements, the Unions agreed, notwithstanding, to "* * * undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work * * *." Therefore, the court of appeals said (App. 53a-54a), the second limitation of liability, like that pertaining to the unauthorized acts of job stewards, "* * * did not relate to or purport to relieve the unions from their own express promise 'that there shall be no strike . . . without first using all possible means of a settlement * * * of any controversy which might arise.' * * * It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part" (App. 55a).

The Petitioners also state, in their summary of the decision of the court of appeals, that the court "in effect converted the 'every reasonable means' obligation into a duty to hold Eazor harmless from any damages resulting from the strike." But what the court of appeals actually said was this (App. 59a-60a):

> "* * * no effort was made to discipline or remove the job stewards and committeemen who were organizing and leading the strikes,[4] to suspend or fine the striking union members, to place the local unions in temporary trusteeship, or even, until the very end of the strike, to take the votes of union members by secret ballot. Stronger measures, such as these, were indicated, were available and should have been taken to the extent necessary.
>
> "* * * whether the use of the stronger measures which were available would actually have been successful in ending the strikes is beside the point. It was highly probable that they would have been since the use of only one of them in an earlier strike by a Teamsters local against Eazor had been sufficient to end it.[4] The point here is that the unions were contractually obliged to carry out their agreement that there should be no strike by employing *all* reasonable means available to them to seek to end the existing unauthorized strikes and this they failed to do. Having thus chosen not to try out those stronger measures which were available, indicated, and probable of success they cannot be heard to say that such measures, if employed, would not have been successful in ending the strikes in this case and that, accordingly, it was not necessary to try them * * *."

Although the court of appeals did not specifically allude to this, its conclusions in this regard were also buttressed by the evidence of Eazor's previous problem free labor relations history and Thomas Eazor's splendid relationship with the Eazor men in Pittsburgh prior to the

4. That such discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania during the April, 1968, strike (see page 11, *supra*) which ended at Sharon when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line (J.A. 273, 291-292).

Strike (J.A. 2883, 2895); the fact that only two Local No. 377 men, with resort to the grievance procedure, were involved in the origin of the Strike (J.A. 998-1024, 1079-1081); testimony that only 9-10 men at Warren objected to Eazor management and that some Local 377 men wanted to work throughout the Strike (J.A. 1077-1078, 1820-1822, 1308, 1315, 1332), and the admission by the President of Local No. 249 that, at the inception of the Strike, the men in Pittsburgh were angrier with the Union than they were with Eazor, and that most wanted to return to work (J.A. 2884-2892).

With respect to damages, the Petitioners claim that the court of appeals sanctioned the trial court's failure to make specific findings as to the steps which it followed in establishing plaintiffs' direct strike loss to be $1,079,332, and that the court of appeals then refused to reexamine the lower court's decision on this issue. Actually, as noted *supra*, the finding of the trial court in this regard was in accordance with Proposed Findings of Fact (J.A. 452-508) and Briefs (Supplemental Appendix 176b-241b, 332b-437b), all based upon and carefully annotated to the Record, submitted to the trial court by plaintiffs and printed in the Appendices below, along with the responsive sets of Proposed Findings and Briefs filed by the defendant Unions. The Unions, in their primary Brief below (pp. 40-41), pointed out that "* * * there were no issues of credibility, but only questions as to which approach (of the competing accountants) appeared the more persuasive * * *"; then the Teamsters themselves suggested that this issue was one which "the appellate court may proceed to decide * * * without remand."

That the court of appeals did not accept the lower court's decision on this issue arbitrarily, but only after reviewing the evidence itself, is also clear from its Opinion. (App. 65a).

Nor was the court of appeals cavalier, as the Petitioners imply, in its review of the trial court's award of pre-judgment interest. The court of appeals noted (App.

76a): "When damages resulting from a breach of contract are ascertainable with mathematical precision, pre-judgment interest is awardable as a matter of right. If * * * the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add pre-judgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation * * *." Then, the court held that these were appropriate rules for discretionary application in this case, and that the district court had not erred in their application (App. 77a).

REASONS FOR DENYING THE WRIT

I. In Imposing Liability, the Court Below Decided No "Questions of Almost Universal Import" But, Rather, Properly Interpreted the Particular Contract Involved In This Case.

A. The Contract Imposed Duties With Respect to All Strikes.

While the court of appeals did refer to matters of general policy by way of justification for its ultimate conclusion on the liability issue, the fact is, and the Opinion of the court of appeals makes very clear, that the decision in this case was based on the language of the particular contract involved and not on matters of general labor policy (App. 52a-56a).

Set forth below are the comparable provisions of the Local Supplements involved which, with the National Master Freight Agreement of April 1, 1967, were all negotiated contemporaneously on behalf of all of the Unions involved by the National Union Committee of the International Brotherhood of Teamsters (J.A. 166-167, 169-171):

Teamsters Joint Council No. 40 (Local 249) Supplements (J.A. 305a-307a)

Article 44.

Section 1. The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

(The balance of this section describes the step by step procedure to be followed in handling grievances.)

(There is no provision comparable to Section 2 of Article 43 of the Central States Area Supplement.)

Central States Area—Ohio (Local 377) Supplements (J.A. 348a-350a)

Article 43.

The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

Section 1. (This section is devoted entirely to a description of the step by step procedure to be used in handling grievances.)

Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. The Union may from time to time amend its list of authorized representatives by notification by Certified Mail. It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement the Union shall not be liable for damages resulting from such unauthorized acts of its members.

While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above,[5] it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any re-

5. This emphasis has been supplied by the writer of this Brief.

course to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. * * *

A fair reading of the parallel provisions quoted above establishes clearly that both involve identical prohibitions against strikes, but that the Central States Area (Local 377) Supplements include additional language whose purpose was to limit Union liability somewhat for strikes which were not authorized at their inception by a designated union representative, *while preserving, nevertheless, the Unions' duty to exercise "every reasonable means" to end such strikes, even if unauthorized*, which duty would necessarily be implied from the initial "no strike" pledge found in both forms of Supplement if they were standing alone.

This is exactly what the court of appeals said on this (App. 55a-56a):

> "* * * The reference in the clause to an 'unauthorized stoppage of work mentioned above' is a recognition that this obligation exists notwithstanding the unions' release from liability for its members' unauthorized strike activities which is contained in the immediately preceding paragraph. Moreover, the clause functions here as a drafting device to make it clear that the right which the paragraph confers on the employer does not operate to abrogate that union obligation, which is to continue side-by-side with the employer's right. Thus the recital is a recognition of the unions' implied obligation continuously to endeavor to end an unauthorized strike. Since the obligation is one which is implied from the no-strike clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted. And since the no-strike clause appeared in all the supplemental agreements involved in this case, it necessarily follows that the unions had a similar obligation under the agreements applicable to each of them, respectively, to use all reasonable means to end a strike existing in violation of that clause, regardless of the presence or absence of a recital of the obligation in the agreements to which a particular union was a party. * * *

Furthermore, to the extent that any duty by implication was recognized to exist in this case, the feat of construction involved was not substantially different from the duty not to strike recognized to exist by implication in *Teamster Union v. Lucas Flour Company*, 369 U.S. 95 (1962); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *U. S. Steel Workers v. Warrior & Gulf Nav. Coal Co.*, 363 U.S. 574 (1960); *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 551, 553-556 (6th Cir. 1970); *Armco Steel Corp. v. United Mine Workers of America*, 505 F.2d 1129 (4th Cir. 1974).

Petitioners argue that the decision of the Third Circuit in this case conflicts with the decision of the Fourth Circuit in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (1955), *cert. denied*, 350 U.S. 847 (1955). The international union involved in that case was not even a direct party to the collective bargaining agreement in issue there, and that agreement included no express obligation on the part of the union with respect to strikes. Notwithstanding, the officials of the international union succeeded in persuading the wildcat strikers to return to work within two days after the walkout began, and on the employer's terms. In the present case, the court of appeals

stated (App. 51a): "We do not read the *Haislip* case as authority for the defendants' position" because "* * * there was nothing in the contract (involved in *Haislip)* making the defendant union liable for * * * unauthorized strikes * * * or requiring that it take any action with regard to it."

More recently, the Fourth Circuit itself recognized this to be a valid basis for distinction between *Haislip* and *Eazor* and further stated that the Opinion of Judge Maris in the present case "* * * is consistent with * * * the views we express in this Opinion." *United States Steel Corp. v. United Mine Wkrs. of Am.*, 519 F.2d 1249, 1255 (1975).

Petitioners also suggest that the decision below is contrary to the labor relations policy espoused in *H. J. Heinz & Co. v. Labor Board*, 311 U.S. 514, 523-526 (1951), which holds that it is an unfair labor practice to refuse to reduce a collective bargaining agreement to writing. The duty which the court below held existed here *is* established by a written contract. In that contract, the Unions specifically agreed that "* * * there shall be no strike * * * without first using all possible means of settlement." It is the Teamsters, rather than the plaintiffs, who desire to have that language rewritten. They wish the contract interpreted to read: "* * * there shall be no strikes *authorized by the Unions* * * * without first using all possible means of settlement." But that is not what the contract says.

Petitioners postulate enormous complications in negotiating new collective bargaining agreements if the *Eazor* decision is permitted to stand. The decision of the trial court, which is no different on this issue than the decision of the court of appeals, was rendered almost three years ago, and no learned commentator has predicted, nor do any intervening statistics indicate that affirming that decision will have any adverse effect whatever on collective bargaining. Indeed, one author has stated, of the district court's decision, 19 Vill. L. Rev. 665-671 (1974), "Perhaps the most important positive effect * * * will be

the promotion of cooperation between management and labor * * * (which) * * * will be an important step in further promoting peaceful resolution of labor disputes."

Another specter posed by the Teamsters is the asserted likelihood that the *Eazor* decision will be interpreted as inconsistent with the holding of this Court in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956), that even the broadest "no strike" clause does not prevent employees from striking to prevent an employer from interfering with the collective bargaining process by summarily firing an employee solely because of his organizational activities. That this argument is but a strawman becomes patently clear when one considers that, in *Eazor*, the Third Circuit cited with approval *Penn Packing Co., Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local 195*, 497 F.2d 888 (1974), in which, after the district court decision as to liability in *Eazor*, the same Court of Appeals interpreted another union's outright guarantee against all strikes as an implicit obligation to do no more than to take reasonable and timely steps to end strikes which were not authorized by the union. Such steps were taken by the union in the *Penn Packing* case, the strike was terminated by the international union within forty-eight hours, and no liability was imposed on the union.

Petitioners argue (Petition, p. 21) that, heretofore, everyone interpreted "no strike" clauses as meaning only that the unions involved would not "authorize, participate in or ratify work stoppages during the life of the Agreement." No authority is cited in support of this assertion, and this Record shows that, from the inception, Eazor management understood that the Local and International Unions involved had an obligation to take active steps to terminate unauthorized as well as authorized strikes. Eazor management testified that this was their understanding (J.A. 1418-1419, 1539), and no Teamster official took the stand to state that the Unions had any different understanding. Indeed, as noted before (Footnote 2, *supra),*

Eazor instituted suit on the day after this Strike began, and on the basis of the same theory on which liability was ultimately imposed.

In addition to daily telephone calls to International officials requesting their assistance during the Strike, Eazor officials made two trips to Washington in a fruitless effort to stimulate International officials to act (J.A. 1444-1448, 2329-2334, 2386). Also, during the Strike, Eazor officials urged Union officials to take the same type of disciplinary steps which the courts below eventually found could and should have been taken in this case, namely, imposing fines, removal of strike-leading stewards, suspensions of the union privileges of strikers, and/or the imposition of trusteeships on the locals (J.A. 2391-2392).

Petitioners also argue that management, heretofore, has relied for protection against wildcat strikes on its privilege to discharge or otherwise discipline those who lead or participate. But, an official of the International himself conceded that large scale discharge of experienced workers who happen to be union members engaged in an authorized strike is not a practical remedy for an employer; the employer merely penalizes himself by the discharges, while, as occurred here, the experienced employees terminated readily obtain employment elsewhere in the industry (J.A. 2971-2972).

Citing a 1948 prediction by Professor Cox[6] as to how Section 8(a)(3) of the Labor Management Relations Act of 1947 *might* be interpreted, petitioners claim that, in holding that there were effective disciplinary steps, including fines, suspension or termination of Union membership, available to the Unions which were not taken (App. 59a), the court below failed to appreciate that, in 1947, Congress reduced the disciplinary powers of unions over their own members. In *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), Professor Cox notwithstanding, this Court held

6. Some Aspects of the Labor Management Relations Act 1947, 61 Harv. L. Rev. 274, 298-299 (1948).

that a union could fine as well as expel members for crossing a valid picket line; certainly the converse is true. Indeed, in *Falcone v. Dantinne*, 420 F.2d 1157 (3d Cir. 1969), the court below recognized, by necessary implication, the propriety, after a due process hearing, of a union's decision to suspend a member, and for five years, for advocating a strike not authorized by the union.

This Court's decisions in *Radio Officers v. Labor Board*, 347 U.S. 17 (1954), and *Labor Board v. General Motors*, 373 U.S. 734 (1963), both of which are cited by the Unions in this connection, are in no way inconsistent with the decision of the court below here. Equally wide of the mark are the arguments advanced at pages 23 and 24 of the Petition with respect to the remarks of the draftsmen of the Labor Management Relations Act of 1947. Clearly, this is not a case in which courts have read a no strike promise into an agreement; it is a case in which courts have held that unions who have contractually agreed that "* * * there shall be no strike" must take whatever reasonable steps are within their power to terminate any strike which violates the agreement, by attempting, among other things, to discipline striking members. As the Seventh Circuit noted in *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Union*, 452 F.2d 49, 53 (7th Cir. 1971), Senator Taft, in the Senate Debate on Section 301, specifically said that "* * * wildcat strikers ought to be disciplined if they prevent a responsible labor leader from performing his agreement."

Equally irrelevent here are decisions such as *Porter Co. v. NLRB*, 397 U.S. 99 (1970), in which it was held that the N.L.R.B. cannot compel an employer to agree to a check-off in negotiating a collective bargaining agreement; and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Howard Johnson v. Hotel Employees*, 417 U.S. 249 (1974), in both of which the Court held that the N.L.R.B. cannot compel an employer, who has no collective bargaining agreement with the employees involved, to honor the provisions of a collective bargaining agreement which a

previous employer had with a union representing some of those employees.

B. "Mass Action" Was an Appropriate Theory.

We consider next the Petitioners' arguments with respect to the application to this case by the court of appeals of the so-called "mass action theory." This theory has been recognized and applied not only by the Court of Appeals for the Third Circuit but by other courts of appeals: *Wagner Electric Corp. v. Local 1104*, 361 F. Supp. 647 (E.D. Mo. 1973), *aff'd*, 496 F.2d 594, 596 (8 Cir. 1974); *Vulcan Materials v. United Steelworkers of America*, 403 F.2d 446, 455 (5 Cir. 1970), and *Local No. 21, United Textile Workers v. Newberry Mills, Inc.*, 238 F. Supp. 366, 373 (W.D.S.C. 1965). This principle is applicable to the liability of a union which is a party to a collective bargaining agreement, both because it may be said to have undertaken to supply performance by a third party, and because, as the court below emphasized (App. 64a), §301(b) of the Labor Management Relations Act (29 U.S.C. 185(b)) precludes recovery of damages from individual union members.[7] Since individual members cannot be liable in damages for refusing to work, the employer, in a very real sense, could have a remedy against no one when it came to enforcing a "no strike" clause against a union which denied responsibility for the mass refusal of its members, allegedly acting independently of their union, to work.

The Petitioners argue that the foregoing is inconsistent with decisions in the Fourth Circuit such as *Haislip, supra*, and the Sixth Circuit in *Lewis v. Benedict Coal Co.*, 259 F.2d 346, aff'd in part and reversed in part, 361 U.S. 459 (1960), and *North American Coal Corp. v. Local Union* 2262, *etc.*, 497 F.2d 459, 467 (1974). We have previously

7. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49 (7th Cir. 1971).

distinguished this case from *Haislip*. In *Lewis*, it was held that liability could be imposed on a union for an allegedly unauthorized strike in which masses of its members participated where, as in the present case, there was evidence that a union official with authority to settle the labor dispute involved had, in fact, encouraged the strike. That evidence was not dissimilar to evidence in the present case that Thomas Fagan, President of Local 249, at the time he instructed his members to return to work, also told them that they could, if they wished, observe the illegal picket line established by the members of Local 377 (J.A. 2910-2911). See also, in accord, *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 551, 558-559 (6th Cir. 1970).

North American Coal Corp. v. Local Union 2262, *United Mine Workers of America, supra*, the second decision from the Sixth Circuit cited by Petitioners, is actually consistent with the ruling of the court of appeals in the present case. There, the court reversed the convictions of various union officials for criminal contempt. The prosecutions resulted from the mass refusal of union members to obey, over a four day period, a temporary injunction intended to terminate an unauthorized strike. The convictions of the union officials were overturned solely because they had been entered notwithstanding extensive testimony, which the trial court accepted at face value, as to the good faith efforts of all of the individual defendants to require the union members to return to work. However, the court of appeals recognized that the same evidence was sufficient to justify prosecution, in an appropriate procedural manner, of the union involved. The court said (497 F.2d 467):

> "Clearly, there was a strike which did continue after issuance of the injunction. The strike was the subject of discussion at local union meetings. There was effective support for the strike voiced at one such meeting. * * *"

Petitioners conclude their argument under this heading with a quotation from Chief Justice Taft in *Coronado*

Coal Co. v. United Mine Workers, 268 U.S. 295 (1925), and argue that it is improper to impose liability on unions for the unauthorized acts of only some of their members, even though they constitute all union members employed by a particular employer. If this argument were valid, no liability could ever be imposed on any union for an illegal strike unless a majority, or perhaps all, of its members participated. No court has ever held that this is so.

Petitioners also argue that it is unfair to impose liability here for the actions of approximately 600 Union members. This argument is factually erroneous because, as we have noted several times before, the picket lines established by the members of the two Locals directly involved were recognized by the members of many other Teamster Locals throughout the nation, even though they, too, were parties to the National Master Freight Agreement and no strike clauses in area supplements. In any event, as the court below made very clear, liability was imposed here, not for the actions of individual Union members, *but for the prolonged and complete abdegnation of responsibility on the part of the highest officials of the International Brotherhood of Teamsters and its Locals* with respect to the performance of the express contractual obligations of their Unions with respect to terminating strikes by Union members. As Judge Maris noted (App. 54a-55a):

> "By these restrictions upon the liability of the unions the employers were undoubtedly bound. But they involved only liability for the unauthorized strike action of job stewards and individual union members. They did not relate to or purport to relieve the unions from their own specific promise "that there shall be no strike . . . without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." This promise was binding on the unions as such, as well as on the union members, and it did not necessarily involve assumption by the unions of responsibility for unauthorized strike action of the individual members. While it was not a 'no fault' guarantee against any work stoppage, *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3 Cir. 1974, 497 F.2d 888, 890, it did involve the obligation of the unions, which was necessarily implied in their promise, not only not to call a strike themselves but also to take timely steps to end such an unauthorized strike by employing any and all such reasonable means at their command as might be needed to get their members back to work. It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part."

II. The Court of Appeals Acted Properly in Awarding Damages and Interest.

A. Strike Losses

Petitioners are correct in stating that the trial judge, after hearing eleven days' testimony, made no specific findings of fact and gave no detailed explanation in his Opinion as to how he calculated the amount which he determined to be plaintiffs' operating losses during the Strike. What is not stated is that, when the trial judge acted in this manner, he did so although counsel for all parties submitted detailed Requests for Findings of Fact and Briefs carefully annotated to the Record. Furthermore, the parties most aggrieved by the trial court's refusal to make detailed findings were the plaintiffs since, by acting as he did, the trial judge found it possible to justify blanket elimination of the great bulk of plaintiffs' claim, even though the evidence as to plaintiffs' losses and their relationship to the Strike was both strong and almost uncontradicted.

Nevertheless, with respect to the single damage claim as to which the trial judge did make a substantial award, namely, plaintiffs' direct operating losses during the Strike, it is possible to establish exactly the basis of the trial judge's reasoning, for his ultimate finding was directly in accord with the operating losses reflected on Eazor's consolidated monthly operating statements for the Strike months of August and September, 1968 (3 J.A. Exhibits 807a-809a), after substitution of actual expenses for certain items which were unknowable and, therefore, only estimated, when the statements were prepared.

The original figures from the monthly statements, and the adjustments, are as follows:

	August	September
Profit or Loss per monthly statements	$(601,577)	$(618,973)
Rev. Adjustment		(67,500)
Adjustment of Legal Expense due to Strike		(4,919)
Adjustment of State Unemployment Compensation Expense	(4,983)	(8,209)
Adjustment of Workmen's Compensation Expense	(13,701)	(22,856)
Adjustment of Group Insurance Expense		(15,050)
Adjustment of Prepaid Tire Expense	(2,000)	(2,000)
	$(580,893)	$(498,439)

The justification for each of such adjustments was explained in Eazor's primary Brief as to damages in the trial court (Supplement Appendix 206b-207b) with precise anno-

tations to the Record. For the benefit of the court of appeals, the Requests for Findings which the parties had filed in the court below were printed in the Appendix and the Briefs filed there in a Supplemental Appendix. Accordingly, to review properly the propriety of the trial court's finding as to the extent of plaintiffs' operating losses during the Strike, the court of appeals was required to do no more than review the Proposed Findings and Briefs in the court below. And *all parties* urged that this be done and a decision rendered without remand. At page 40 of the primary Brief filed in the court of appeals by the International the following was stated:

> "When a trial judge has failed to comply with the requirements of Rule 52(a) or where a finding is set aside as clearly erroneous, a reviewing court is left with two choices. It can remand to the district court for proper findings as was done in *O'Neill*. Alternatively, where the essential evidence is documentary and the case does not turn on questions of credibility, the appellate court may proceed to decide the case without remand. *Surgical Supply Service, Inc.* v. *Adler*, 321 F.2d 536, 539 (3 Cir. 1963); *State of Maryland* v. *United States*, 329 F.2d 722, 723 (3 Cir. 1964); *McComb* v. *Utica Knitting Co.*, 164 F.2d 670 (2 Cir. 1947)
>
> "The strike period loss issue in this case readily lends itself to the latter treatment. The amounts of each proposed adjustment are detailed on documents and there is no dispute as to either the calculations or the accounting data upon which those calculations were based. While the accounting experts differed as to the propriety of some of these adjustments, there were no issues of credibility, but only questions as to which approach appeared the more persuasive. And after Eazor submitted its own recomputations, the differences between the parties narrowed to only ten proposed additional adjustments (See 2JA 652-653)."

To the authorities cited by the International should be added the following: *Swanson v. Levy*, 509 F.2d 859 (9th Cir. 1975); *Neill v. Diamond M Drilling Co.*, 426 F.2d 487, 491 (5th Cir. 1970); *B. F. Goodrich v. Rubber Latex Products, Inc.*, 400 F.2d 401 (6th Cir. 1968).

The Opinion of the court of appeals makes it very clear that, before affirming the trial judge's decision on this issue, the court of appeals itself reviewed his reasoning. The court said (App. 65a):

> "The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. * * * All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous."

The decisions which Petitioners now cite on this question are ones in which courts of appeals, in other situations, chose to exercise their discretion to remand to a lower court for specific findings. Certainly, however, there is no reason whatever for this Court to grant certiorari to review the differing practice adopted by the court of appeals in the present case when its decision in that regard was not only discretionary and supported by another line of cases, but directly in accord with the expressed wishes, at the time, of all of the parties to this litigation.

B. Prejudgment Interest

Finally, Petitioners urge that, even if there is no other basis for granting certiorari, this Court should do so solely because the trial court held that plaintiffs were entitled to prejudgment interest on the relatively modest award which

they received, and that holding the court of appeals reviewed and held to be proper, under the circumstances without assigning specific reasons for its conclusion.

Petitioners concede that this Court has never held that the requirement of Rule 52(a) dictates that either district courts or courts of appeals make specific findings with respect to the basis on which prejudgment interest is awarded or denied. That this is so is the best indication we know of what small moment is this issue to federal jurisprudence.

Certainly, the present case, which has already been pending for seven and a half years, is not one whose final disposition should be further delayed for the purpose of clarifying the law in this matter. This is an action for breach of contract in which the only damages awarded consisted of the plaintiffs' operating losses during the period of the Strike, a matter which could be and was the subject of precise calculation by experts produced by both parties, whose only differences, as the Teamsters themselves conceded, involved matters of opinion rather than fact. As the court of appeals noted (App. 76a-77a):

> "The general rule is that when the damages resulting from a breach of contract are ascertainable with mathematical precision prejudgment interest is awardable as of right. If, however, the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add prejudgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation at the time of judgment. *Miller v. Robertson*, 1924, 266 U.S. 243, 258; *United States v. Bethlehem Steel Corp.*, 3 Cir. 1940, 113 F.2d 301, 308, *aff'd*, 1942, 315 U.S. 289; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 3 Cir. 1956, 235 F.2d 224, 231; *Marrazzo v. Scranton Nehi Bottling Co.*,

1970, 438 Pa. 72, 263 A.2d 336; *Restatement of Contracts* §337; *McCormick on Damages*, 1935, 356."

The court also stated (App. 77a):

> "We think that this is an appropriate rule for discretionary application as a matter of federal law in actions brought under section 301 of the Labor Management Relations Act for breaches of labor agreements and that the district court did not err in its discretionary application of the rule in this case."

Plaintiffs believe that, under the general rule, since the only damages awarded in the present case were those ascertainable with mathematical precision, plaintiffs were entitled to prejudgment interest on that award as a matter of right. Certainly, in any event, there is no basis in the Record for concluding that the lower courts erred in awarding prejudgment interest; quite the contrary. Suit was instituted promptly, prosecuted diligently and at great expense by plaintiffs, and required many years before it was tried to conclusion. Furthermore, while the case was pending, plaintiffs incurred hundreds of thousands of dollars in interest expense for loans which they were required to continue or increase as a result of Strike losses (1 J.A. Exs. 636a). These are factors which no doubt led the courts below, and have also caused other courts, to conclude that awards of prejudgment interest are proper. See, in addition to the decisions cited in the Opinion of the court of appeals, *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (1975), *certiorari applied for*, No. 75-355.

None of the cases which Petitioners cite on this issue governs here. In *Board of Commissioners v. U.S.*, 308 U.S. 343 (1939), this Court did review and reverse a court of appeals in connection with an award of interest. There, however, the district court had exercised its discretion in *denying* prejudgment interest in a claim by Indians against a county for taxes collected on land which the federal government had obtained from the Indians and later conveyed to the defendant county by patent. The trial court

denied interest because it concluded that, throughout, the county had acted "in all innocence". Such a decision, this Court held, was within the scope of the district court's discretion, and the court of appeals had no right to reverse it. Here, on the other hand, the defendants were not "innocent", the district court did award prejudgment interest, and the court of appeals has concluded that the trial court properly exercised its discretion in so holding.

In *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1976), this Court reversed a court of appeals, which in turn reversed a district court for refusing to award back pay in a civil rights case involving discriminatory practices on the part of an employer. The court of appeals reversed and recognized as valid plaintiffs' entire damage claim. This Court's decision to remand resulted solely from its determination that, at the inception of the litigation, the plaintiffs had disclaimed any intention to claim damages for back pay; therefore, the Court said, there was an unresolved issue as to whether, and if so to what extent, the defendants may have been prejudiced in dealing with palintiff 's claim by the preliminary position taken by their lawyer. This was to be determined on remand.

Again, no similar issue is present here. From the beginning, defendants have denied liability and offered nothing in response to plaintiffs' claim.

Of the remaining cases cited by Petitioners, *Robert C. Herd & Company v. Krawill Machinery Corp.*, 256 F.2d 946 (4th Cir. 1958), aff 'd on another question, 359 U.S. 297 (1959); *McCrea v. Harris County Houston Ship Channel Navigation District*, 423 F.2d 605 (5th Cir. 1970), *cert. denied*, 400 U.S. 924 (1970), and *Wessel v. Buhler*, 437 F.2d 279 (9th Cir. 1971), all involve situations in which courts of appeal reversed district courts for failing to explain why they had *refused* to award prejudgment interest. Certainly, such holdings can be of no comfort to the defendants here; on the other hand, the reasoning of the Court of Appeals for the Fourth Circuit in *Herd & Company* supports the award of prejudgment interest under circumstances such as Eazor's.

Finally, that the court of appeals in *Norte & Co. v. Huffines*, 416 F.2d 1189 (2d Cir. 1975), was not satisfied with the trial court's explanation of its award for prejudgment interest is certainly no basis for concluding that the court of appeals in the present case erred when it concluded, after it reviewed the decision of the trial court in the present case, that the award of prejudgment interest was proper. In this connection, certainly, the court of appeals was also entitled to consider whether, in view of the highly arbitrary manner in which the trial judge had dealt with every other damage claim of the plaintiffs in order to reach his final verdict, he might not behave in a manner equally arbitrary, in the event of a remand, by reversing his original decision with respect to prejudgment interest in a situation where both the general principles of law and the facts cry out for such an award. This, in turn, would have necessitated a further appeal on the question of interest and further delay of the plaintiffs.

The court of appeals was right in concluding that this case must end sometime.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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